

***United States Court of Appeals  
for the Second Circuit***



**PETITIONER'S  
REPLY BRIEF**



76-4169

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

No. 76-4169

ROBERT F. HALTMIR, Petitioner, vs.  
COMMODITY FUTURES TRADING COMMISSION, Respondent.

BRIEF OF ROBERT F. HALTMIR IN RESPONSE TO BRIEF OF  
COMMODITY FUTURES TRADING COMMISSION

Reply Brief

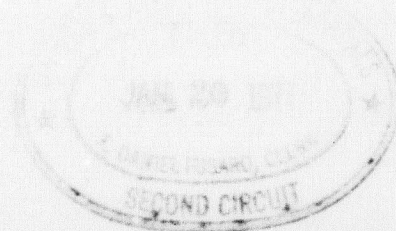
INTRODUCTION

This brief will largely be concerned with two questions. First, has this proceeding in its entirety been conducted in a proper, fair, objective impartial, judicial manner in keeping with the intent of Congress, or was it permeated with unjudicial conduct, unfair tactics, perjurious statements, and biased judgements by the CFTC Judge, agents, attorneys, witnesses, and Commissioners? Second, does the CFTC's alleged virtually unlimited "discretionary" powers include use of unfair tactics, unjudicial conduct, and biased judgements in administering its law, or do such proceedings conflict with the intent of Congress and are subject to review by outside judicial authority? I contend that the CFTC Judge, attorneys, agents, witnesses, and Commissioners have not conducted the proceeding in a fair, impartial, objective manner and that Congress never intended any government agency administering law to conduct legal proceedings in this manner. Therefore, it is a matter for this Court to review in its entirety.

II

BIASED CONDUCT OF THE PROCEEDING

Details of the unjudicial, biased manner the CFTC has conducted this entire proceeding are contained in my appeal of Judge Liebert's decision to the CFTC Commissioners as well as in my appeal to this Court. The CFTC brief warrants a few additional comments.



B  
P/S



1. The CFTC finally admitted in their brief that they erred in determining a number of clear obvious facts, which have been in the testimony and exhibits from the beginning. Despite my written briefs to the contrary, the CFTC Judge and three Commissioners all neglected to do their homework and familiarize themselves with the facts of this case. They deliberately ignored my briefs and the evidence, and based their decisions and opinions on erroneous facts. These factual errors were not harmless, as the CFTC asserts in their brief, but, if they had been recognized at the outset, an entirely different determination may have resulted. I believe that these factual distortions were deliberate and willful by CFTC officials and were designed to hamper my defence unfairly. Now finally, as a result of my appeal to this Court, they admitted for the first time to a number of factual errors. In the normal course of events the CFTC would never have done this, despite my written briefs and overwhelming evidence in the record. This is characteristic of the unfair, unjudicial conduct of the entire proceeding. Congress did not intend the CFTC to administer law in this manner.

2. I have complained on a number of occasions that the CFTC refused to supply me with copies of the exhibits they presented at the Hearing despite their promises to do so in the presence of Judge Liebert. I called this fact to the attention of Judge Liebert and the CFTC Commissioners, as well as this Court, in writing, and they still have not supplied me with copies of these exhibits. It is obvious the CFTC have deliberately denied me copies of these exhibits and that the CFTC Judge and Commissioners would not do anything about it. I believe this constitutes unfair tactics and that Congress did not intend CFTC law to be administered in this manner.

The CFTC "Appendix" supplied this Court contains Exhibits 2 and 6. I am still without copies of exhibits 1, 3, 4, 5, and 7. I once again request the CFTC to honor its pledge at the Hearing and to supply me with copies



of these Exhibits. Additionally, I request the CFTC to cease and desist their unfair tactics and brazen attempts to hinder my defence. I do not believe Congress intended that law be administered in this manner.

I do believe, on the other hand, that Congress did intend that CFTC Judges and Commissioners exercise their authority justly and make certain that CFTC attorneys do not employ unfair tactics such as withholding copies of Exhibits from Defendants. The CFTC Judge and Commissioners have not acted impartially in this matter. They have implicitly condoned the unfair tactics of CFTC attorneys.

3. In this connection, for the first time I have discovered from the copy of Exhibit 2 included in the CFTC Appendix that the CFTC has grossly exaggerated their allegations against me. I had not previously been in a position to determine this, since I had been denied copies of the Exhibits. Specifically, the CFTC's Exhibit 2 shows that only about one half the number of contracts alleged to have been traded were actually traded. The CFTC attorneys deliberately distorted the evidence and cited statistics which count the purchase and sale of a single contract as two contracts. Such double counting is unconscionable. I believe that their desire to hide this distortion in their allegations from me may have been one of the reasons they refused to supply me with copies of the Exhibits. They wanted to prevent me from analyzing the evidence upon which their allegations were based. I do not believe Congress intended such tactics be used in administering law.

4. The Appendix the CFTC supplied this Court consists largely of documents withheld from me. They were fully aware I could not have supplied such an Appendix, since they did not permit me to have those documents in my possession. Nevertheless, they asserted in their cover letter to that Appendix that I should have supplied it, and that they were doing me a favor in providing it. I do not believe this constitutes fair play.

5. The CFTC assert that Commissioners Ogley, Painbort, and Martin's Opinion was formulated independent of Judge Liebert's Decision. Yet the CFTC attorneys, who now admit to factual errors, offer no explanation why the Commissioners and Judge all made the same factual errors, despite by written briefs and overwhelming evidence to the contrary in the record. This constitutes evidence that they did not act independently. the Commissioners did not perform the function of appeal judge but only sought to support their own bureaucracy: their Judge, their attorneys, and their agents. Congress did not intend the CFTC to administer law in this manner.

6. The CFTC Brief to this Court contains a fact which I had been previously unaware. Millet and Judge Liebert had a friendly conversation while waiting for documents to be reproduced. This was during the recess. This first conversation, which the CFTC official witnessed, explains why Millet remained after the conclusion of the Hearing to talk to the Judge. It is apparent that this second conversation, which lasted some 10 to 20 minutes, was a continuation of the one begun during the recess.

Most important, however, it also explains the change in Judge Liebert's attitude after the recess. During the second part of the Hearing, Judge Liebert personally took over the role of prosecuting attorney. Mr Rader, the official prosecuting attorney, sat silently while the CFTC Judge pursued an aggressive and hostile line of questioning. I was without legal counsel and did not protest. Judges should only perform the function of Judge, leaving the prosecution to the prosecuting ~~production~~ attorney. Congress did not intend Judges to take over the role of prosecution in Administrative Law. As a result, all testimony solicited by Judge Liebert should be disregarded and stricken from the record.

CFTC assertions that the Judge attempted to help me during the Hearing are untrue and deliberately misleading.



7. The failure of the CFTC to investigate the perjurious testimony of Millet and to investigate the role of CFTC agents and attorneys in soliciting his perjurious testimony constitutes prejudicial conduct. The CFTC has acted to protect their employees and witnesses rather than to conduct a fair impartial proceeding. I demonstrated conclusively in my "Suggested Findings of Fact" to the CFTC Judge that Millet's testimony was untruthful in a number of instances. At no point in the entire proceeding was the CFTC even attempted to refute these contentions. Yet in their Brief to this Court they assert Millet's testimony was "believable". This cannot be considered an unbiased, sincere statement.

I respectfully request this Court order an investigation into Millet's perjurious testimony, including the role of CFTC officials in soliciting his testimony. Congress did not intend the CFTC to protect perjurers in administering its law or to employ agents and attorneys that deliberately solicit perjurious testimony in order to effect convictions.

8. With respect to the motivation of the CFTC Judge and the three Commissioners, one need look no farther than the personal relationship between the Judge and Millet and the desire of the Commissioners to support their own bureaucracy. Congress did not intend the CFTC to use its discretionary powers in this manner. Unfortunately, such action is characteristic of governmental agencies in our country.

### III

#### CFTC "REMEDIAL" SANCTIONS HAVE "PUNATIVE" ASPECT

The sanctions imposed by the CFTC have two aspects. First, I am denied registration as an associated person of a futures commission merchant (FCM) and earn commissions by executing trades for customers. Second, I am prohibited from becoming a customer myself and opening an account with a FCM and trade commodities for my own personal account and risk.



The first may be construed as remedial. The second, on the other hand, can not be considered "remedial" in this case in any sense of the word. It is solely punitive, having no remedial connotations.

As a result of 1974 Amendments to the Act, registration as an associated person with a FCM may be denied without prohibiting personal trading rights as a customer of an FCM, which requires no registration and is open to all individuals. Denial of personal trading rights can not be justified as necessary to "protect the public interest" in cases such as this one. It can only be construed as punitive. Although the CFTC may have the power to impose such sanctions, they do not and should not have the right to call this "remedial".

The CFTC's Brief to this Court contains a number of references to SEC decisions. The strongest "remedial" sanction imposed by the SEC is denial of registration as broker-dealer. They do not prohibit sanctioned individuals from owning or trading securities on the recognized exchanges for their own account and risk. The SEC does not prohibit sanctioned individuals from buying and selling the common stock of, say, General Motors and assert such prohibition is "remedial", since it has no remedial connotation. The SEC respects the right of individuals to own capital assets.

When the CFTC does remedial sanctions warranted, they should make sure in exercising their discretion that only remedial sanctions are actually imposed and that such sanctions do not contain substantial punitive elements. Congress did not intend the CFTC to use their discretion to impose sanctions containing punitive elements in remedial proceedings. The CFTC should use their discretion to purge sanctions of punitive aspects in remedial proceedings. This Court has the power to review "remedial" sanctions containing punitive elements and to remove those punitive elements when the CFTC fails to use their discretion properly and remove the punitive elements themselves.

DISCRETION TO IMPOSE SANCTIONS IMPLIES RESPONSIBLE  
CONDUCT

The CFTC assert that their discretionary authority to impose sanctions granted by Congress is virtually limitless, just as long as certain procedures are observed. Congress did not specify the severity of sanctions for various offences. The CFTC could have imposed a suspension of 10 years or longer or two weeks or less, at their discretion. They could have simply denied the registration as an associated person of an FCM, while not denying personal trading rights and including punitive elements in the sanctions. As a result, the CFTC has the discretionary power to deny an individual of his life through economic impoverishment by preventing him from earning a living. They have construed their discretion to include punitive elements in remedial sanctions, even though not intended in the legislation. And they assert that Congress intended their discretion in this respect not be subject to review by an outside judicial authority.

It is appropriate to question if Congress has the power to grant such broad discretionary power to impose sanctions on individuals in the first place. The U.S. Constitution intends that our government function under a system of checks and balances and that no one branch of government <sup>HAS</sup> powers not subject to review or check by another branch of government.

<sup>IP</sup> Most important, if Congress really did intend the CFTC to have such broad discretionary powers to impose sanctions, Congress certainly must also have intended that such discretion be exercised with the highest standards of integrity and that there should not be the slightest question of bias, prejudice, unfair tactics, perjury, unjudicial conduct, misconduct by officials, etc. Congress never would have granted such discretionary powers without expecting that they be exercised fairly and justly, without the slightest tinge of impropriety. Congress intended that discretion and responsibility go hand in hand. The CFTC has not lived up to such standards in this proceeding.



CONCLUSION AND MOTION

Congress did not intend that discretion justify impropriety. Assertions that the CFTC has the faith and trust of Congress embodied in their enabling legislation can not justify any and all CFTC actions, whatever their nature. The CFTC has an obligation to Congress in exercising its discretion in imposing remedial sanctions to avoid even the slightest tinge of impropriety. In this proceeding the CFTC exercised its discretion in an unobjective, biased manner. Congress did not intend the CFTC, or any other government agency administering its law, to act in this manner. The CFTC has violated the trust of Congress.

One of the CFTC Commissioners, Mr. Gary Seever, recognized in his dissenting opinion that the CFTC may not have lived up to its obligation to Congress to act as a responsible, impartial government agency, avoiding any hint of impropriety, in imposing sanctions.

Since sufficient grounds exist to conclude that the CFTC may have misused their discretionary authority in this proceeding, this is a proper matter for review by this Court. Accordingly, I respectfully request that the Court grant the following motions:

1. Nullify the entire proceeding, removing all sanctions,
2. Order the CFTC to conduct an entirely new hearing under a different Judge,
3. Order the CFTC to cease and desist from acting with impropriety in this proceeding, and to conduct any new hearing in a proper fair judicial manner,
4. Order the CFTC to include an investigation of perjury by Millet and misconduct by their employees in soliciting Millet's perjurious testimony in any new hearing,
5. Order Commissioners Bagley, Rainbolt, and Martin to disqualify themselves from any further decisions or opinions in this matter,
6. Order the CFTC to supply me with copies of the exhibits they presented at the hearing so that I may use them in my defence.



January 19, 1977

A. Daniel Fusaro, Esquire  
Clerk, United States Court of Appeals  
for the Second Circuit  
U.S. Courthouse  
Foley Square  
New York, NY 10007

Re: Halmier vs. Commodity Futures  
Trading Commission No. 76-4169

Dear Mr. Fusaro,

Attached is my reply to the Brief submitted by the  
Commodity Futures Trading Commission. Six copies  
are included.

I have forwarded a copy to the CFTC in Washington D.C.

Very truly,  
*Robert F. Halmier*  
Robert F. Halmier